

Tan See Hock v Development & Commercial Bank Bhd & Anor

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 31-362
OF 1987

JAMES FOONG J

4 JULY 1993

Land Law — Charge — Application to sub-divide land — Chargee consented to application — Surrender and re-alienation of land — Reversion of land to State — Effect similar to forfeiture — Whether chargee's interest remained in land after re-alienation — Whether land freed and discharged from interests subsisting therein before surrender and re-alienation — National Land Code 1965 ss 131 & 199

Land Law — Charge — Indefeasibility of title — Charge unregistered — Whether chargee has an equitable charge — Whether equitable charge indefeasible under s 340 of the National Land Code 1965 — National Land Code 1965 s 340

Land Law — Caveat — Application to remove private caveat — Notice of removal in Form 19C issued at request of unregistered chargee — Whether unregistered chargee could request for notice to be issued — Whether ultra vires — National Land Code 1965 s 326

The plaintiff was the registered owner of 71 sub-divided properties ('the said land'), which prior to sub-division, was held under CT 17031 Lot 1046 Mukim Sedenak, Johor ('CT 17031'). The plaintiff, with four other land owners, entered into a joint venture agreement with Bantar Sdn Bhd ('Bantar') whereby the plaintiff agreed to transfer the said land to Bantar as trustee for the purpose of sub-division and for Bantar to develop the said land into a housing scheme. Bantar charged the said land to the first defendant by way of a first legal charge to secure financial facilities. Upon approval of the application for sub-division and with the consent of the first defendant, the said land was surrendered to the authorities for re-alienation and issuance of sub-divided titles. The authorities cancelled CT 17031 and issued 71 sub-divided documents of title with the name of Bantar as registered proprietor, without any encumbrances such as the first legal charge of the first defendant thereon. The plaintiff lodged caveats on the said land. Similarly, the first defendant also lodged their own caveats on the said land. The housing scheme on the said land did not materialize and Bantar was unable to repay the loan granted by the first defendant. At the request of the first defendant, the registrar of titles issued a Form 19C, giving notice to the plaintiff of the registrar's intention to remove the plaintiff's caveats under s 326 of the National Land Code 1965 ('the NLC') unless extended by an order of the court. The plaintiff applied to extend the private caveats lodged by him on the said land, contending that he had established an interest in the land and that there was a serious question to be tried with regard to the ownership of the land. The plaintiff also asserted that

- A Form 19C, which was issued by the registrar of titles, was invalid as it was ultra vires.

Held, allowing the plaintiff's application:

- B (1) The surrender and re-alienation of the said land had the same effect as if the said land had reverted to the state authority pursuant to a forfeiture under s 131 of the NLC. When the said land was forfeited by the state, it was 'freed and discharged from all titles and interests subsisting or capable of arising immediately before the forfeiture took effect'. This, therefore, extinguished the 'interest' of the first defendant which had a first legal charge over CT 17031.
- C (2) Section 340(1) of the NLC expressly confers indefeasible title or interest on any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered. It never mentions such a privilege to be conferred on a chargee not registered neither does it recognize an equitable charge to benefit it from being indefeasible. As the first defendant was not a registered chargee, they could not avail themselves of the indefeasibility of their interest in the said land.
- D (3) As the first defendant was not a registered chargee, it had no legal right to proceed by way of s 326 of the NLC. By doing so, it would render the acts of the registrar, including the issuance of Form 19C, ultra vires. The word 'interest' in the section referred to a registered interest. Therefore, s 326(1) of the NLC can only be utilized by a registered owner or a person with a registered interest, which would include a registered chargee. Any other category of persons aggrieved should seek relief by way of s 327 of the NLC.
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[Bahasa Malaysia summary]

- G Plaintiff adalah tuanpunya berdaftar 71 keping tanah yang sudah dipecah bahagikan ('tanah itu'), yang sebelum dipecah bahagi, telah dimilikinya di bawah CT 17031 Lot 1046 Mukim Sedenak, Johor ('CT 17031'). Plaintiff, bersama dengan empat tuanpunya tanah yang lain, telah mengikat perjanjian usaha sama dengan Bantar Sdn Bhd ('Bantar') di mana plaintiff telah bersetuju untuk memindahkan tanah itu kepada Bantar sebagai pemegang amanah, untuk tujuan pecah bahagi dan supaya Bantar dapat memajukan tanah itu sebagai suatu skim perumahan. Bantar telah menggadaikan tanah itu kepada defendan pertama melalui gadaian undang-undang pertama untuk menjamin kemudahan kewangan. Apabila permohonan pecah bahagi diluluskan dan dengan persetujuan defendan pertama, tanah itu telah diserahkan kepada pihak berkuasa untuk pemberimilikan semula dan pengeluaran hakmilik pecah bahagi. Pihak berkuasa telah membatalkan
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CT 17031 dan telah mengeluarkan 71 dokumen hakmilik yang dipecah bahagi, dengan nama Bantar sebagai tuannya berdaftar, tanpa sebarang bebanan seperti gadaian undang-undang defendan pertama itu. Plaintiff telah memasukkan kaveat ke atas tanah itu. Begitu juga defendan pertama. Skim perumahan di atas tanah itu tidak menjadi kenyataan dan Bantar tidak mampu membayar balik pinjaman yang diberikan oleh defendan pertama. Atas permohonan defendan pertama, pendaftar hakmilik telah mengeluarkan Borang 19C dan memberi notis kepada plaintiff tentang tujuan pendaftar untuk membatalkan kaveat plaintiff di bawah s 326(1) Kanun Tanah Negara 1965 ('Kanun itu') kecuali jika ia dilanjutkan oleh perintah mahkamah. Plaintiff telah memohon untuk melanjutkan kaveat persendirian yang telah dimasukkan olehnya ke atas tanah itu, dan menegaskan bahawa beliau telah menunjukkan suatu kepentingan di dalam tanah itu dan terdapat suatu soalan serious yang perlu dibicarakan mengenai keempunyaan tanah itu. Plaintiff juga telah menegaskan bahawa Borang 19C, yang telah dikeluarkan oleh pendaftar hakmilik, tidak sah dan ultra vires.

Diputuskan, membenarkan permohonan plaintiff:

- (1) Penyerahan dan pemberimilikan semula tanah itu mempunyai kesan yang sama seperti jika tanah itu dikembalikan kepada pihak berkuasa negeri mengikut suatu pelucuthakan di bawah s 131 Kanun itu. Apabila tanah itu dilucuthakkan, ia menjadi bebas dan dilepaskan dari semua hakmilik dan kepentingan yang wujud atau yang mungkin wujud sebaik sebelum pelucuthakan itu berkesan ('freed and discharged from all titles and interests subsisting or capable of arising immediately before the forfeiture took effect'). Dengan yang demikian, kepentingan defendan yang mempunyai gadaian undang-undang pertama ke atas CT 17031 dilenyapkan.
- (2) Seksyen 340(1) Kanun itu memberikan hakmilik atau kepentingan yang tidak boleh sangkal kepada setiap orang atau badan yang didaftarkan sebagai tuannya tanah, ataupun didaftarkan di dalam mana-mana pajakan, gadaian atau isemen. Ia tidak mengatakan bahawa keistimewaan itu diberikan kepada pemegang gadaian yang tidak berdaftar; ia juga tidak mengenali sesuatu gadaian ekuiti untuk menjadikannya tidak boleh sangkal. Oleh kerana defendan pertama bukan pemegang gadaian berdaftar, mereka tidak boleh menyatakan bahawa hakmilik mereka tidak boleh sangkal.
- (3) Oleh kerana defendan pertama bukan pemegang gadaian yang berdaftar, ia tidak mempunyai hak yang sah untuk bertindak di bawah s 326 Kanun itu. Dengan berbuat demikian, ia telah menjadikan tindakan pendaftar, termasuk pengeluaran Borang 19C, ultra vires. Perkataan 'kepentingan' ('interest') di dalam seksyen itu merujuk kepada kepentingan berdaftar. Oleh itu, s 326(1) Kanun itu hanya boleh digunakan oleh seorang tuannya berdaftar dan sesiapa yang mempunyai kepentingan berdaftar,

- A termasuk pemegang gadaian berdaftar. Sebarang kategori orang lain yang terkilan patut mendapat relif melalui s 327 Kanun itu.]

Case referred to

1 *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53 (refd)

B Legislation referred to

National Land Code 1965 ss 131, 199, 326, 340

Ng Chew Hor (Leng & Co) for the plaintiff.

N Chandran (Adnan Sundra & Low) for the defendants.

- C **James Foong J:** Enclosure 1 is an application by the plaintiff to extend the private caveats lodged by the plaintiff on 71 sub-divided properties held under HS(D) Nos 134280–134281, 134363–134397 and 134424–134458 for Lot Nos 19106–10107, 19189–19223 and 19250–19284 respectively, all in the Mukim of Sedenak, Johor (hereinafter referred to as ‘the said land’).

- D This extension was applied for, for the reason that the plaintiff had received a Form 19C from the registrar of titles giving notice of the registrar’s intention to remove the plaintiff’s caveats under s 326 of the National Land Code 1965 (‘the NLC’) unless extended by an order of the court. Form 19C was issued by the registrar pursuant to an application to
- E the registrar for such removal by the first defendant.

- On 11 April 1987, encl 1 was heard by Mohd Yusoff J (as he then was). This court is informed that due to certain circumstances whereby full argument could not be presented, a temporary extension of the caveats was granted ‘until further argument before this court on a date to be fixed’. This
- F ‘further argument’ was heard before me on 28 June 1993 of which I now give my decision.

- The facts of this case are these. The plaintiff was a registered proprietor of the said land which was, before sub-division, held under document of title CT 17031 for Lot No 1046, Mukim Sedenak, Johor (for ease of reference I shall refer to this document of title as ‘CT 17031’). Together
- G with four other landowners, the plaintiff entered into a joint venture agreement with one Bantar Sdn Bhd. (Again, for ease of reference I shall refer to the joint venture agreement as ‘the JVA’ and Bantar Sdn Bhd as ‘Bantar’.)

- Under the terms of the JVA, the plaintiff agreed to transfer the said land to Bantar as trustee for the purpose of sub-division and for Bantar to develop the said land into a housing scheme whereby the plaintiff would get a certain percentage of the houses built thereon with separate individual sub-divided documents of title to come with it. There was also a provision in the JVA that Bantar could ‘utilize his share of the said land to raise
- H working capital for the development of the said housing project before the approval of the sub-division of the said land from the relevant authorities’.

- I The plaintiff transferred the said land to Bantar and Bantar duly charged the same, by way of a first legal charge, to the first defendant for financial

facilities. Application for sub-division of the said land was approved and, following the adopted procedure in Johor, the said land was surrendered to the authorities for re-alienation and subsequent issuance of individual sub-divided titles. This was consented to by the first defendant on condition that when individual sub-divided documents of title were issued, the same would be collected by the first defendant's solicitors. Consequent to this, the relevant authorities cancelled CT 17031 and issued 71 sub-divided individual documents of title with the name of Bantar as registered proprietor, without any encumbrances such as that of the first legal charge of the first defendant thereon.

Just before the first defendant's solicitors collected these 71 sub-divided documents of title, the plaintiff lodged caveats on the said land. When the 71 sub-divided documents of title were collected, the first defendant also lodged caveats of their own on the said land.

This court is informed by counsel that the housing scheme on the said land did not materialize as stipulated by Bantar and Bantar are unable to repay the loans granted by the first defendant.

The plaintiff's main contention is that the caveats should remain as they are, since the plaintiff has established an interest in the said land and that there is a serious question to be tried with regard to the ownership of the said land. Further, the plaintiff asserts that Form 19C issued by the registrar of titles is invalid for reason that it is *ultra vires*.

The first defendant's argument centred on the indefeasibility of the first defendant's interest as a chargee under s 340 of the NLC. As there are no reasons that the first defendant's interest is defeasible by reason of any of the circumstances specified in sub-s (2) of s 340 of the NLC, the caveats should be removed.

The plaintiff's counsel, Mr Ng, intelligibly argued that s 340 of the NLC does not apply. This is for the reason that when the individual sub-divided documents of title were issued, they were free from encumbrances, without the first legal charge of the first defendant registered thereon.

As I have stated earlier, the procedure adopted by the state of Johor for sub-division of any land is by way of surrender and re-alienation of the land under s 195 of the NLC. Upon such surrender, the land reverts back and vests in the state authority as state land under s 199 of the NLC. Only after this process is completed is the land once again alienated by the state to the original proprietor in sub-divided form. When this happens (the surrender and re-alienation), the said land has the effect of being forfeited under s 131 of the NLC.

For clarity I reproduce s 199 of the NLC:

Upon the making of any memorial pursuant to sub-section (4) of section 198, the land to which it relates shall revert to and vest in the State Authority as State land; and the provisions of section 131 shall apply as if the land had reverted pursuant to a forfeiture.

When the land is forfeited by the state, the land is 'freed and discharged from all titles and interests subsisting or capable of arising immediately before the forfeiture took effect'. This is so provided under s 131(a) of the NLC.

A Again for the sake of clarity, I reproduce s 131(a) of the NLC:

Upon the taking effect in relation to any land of any forfeiture under this Act—

- (a) the land shall revert to, and vest in, the State Authority as State land, freed and discharged from all titles and interests subsisting or capable of arising immediately before the forfeiture took effect;

B This therefore extinguishes the ‘interest’ of the first defendant which had a first legal charge over CT 17031. Subsequently, when the said land was alienated by the state to Bantar with individual sub-divided documents of title, these titles were free from encumbrances such as first legal charges. The interest of the first defendant can only exist if there are first legal charges registered over them. However, as there are none, the first defendant cannot seek protection under s 340 of the NLC.

C Mr Chandran, counsel for the first defendant, raised the theory of the first defendant possessing an equitable charge over the said land, thereby its interest thereon is indefeasible under s 340 of the NLC. I find this theory
D contrary to the very objective of the Torrens system of land registration. Section 340(1) of the NLC expressly confers indefeasible title or interest on ‘any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered’. It never mentions such a privilege to be conferred on a chargee not registered neither does it recognize an equitable charge to benefit it
E from being indefeasible. This court is not prepared to read into an Act of Parliament words which are not there. Section 340(1) of the NLC is clear and unambiguous and as the first defendant is not the registered chargee, they cannot avail themselves of the indefeasibility of their interest in the said land.

F I shall now turn to Form 19C which was issued by the registrar pursuant to a request by the first defendant. Section 326(1) of the NLC reads as follows:

Any person or body whose land or interest is bound by a private caveat may at any time apply to the Registrar for its removal pursuant to this section, and the Registrar shall—

- G (a) serve upon the person or body at whose instance the caveat was entered a notice of intended removal in Form 19C; and
(b) subject to sub-section (2), remove the caveat at the expiry of the period of one month specified in that notice.

H The word ‘interest’ in this section must be in reference to a registered interest. A registered interest would include a registered charge. Therefore, s 326(1) of the NLC can only be utilized by a registered owner (see the judgment of Ali Hassan FJ in *Macon Engineers Sdn Bhd v Goh Hooi Yin*¹) or a person with a registered interest which would include a registered chargee. Any other category of persons aggrieved should seek relief by way of s 327 of the NLC through applications to the court.

I In this case, the first defendant is not a registered chargee and has no legal right to proceed by way of s 326 of the NLC. By doing so, it would render the acts of the registrar including the issuance of Form 19C ultra

vires. When such acts are ultra vires, Form 19C has no legal effect on the plaintiff and the caveats should remain where they are.

In the course of the first defendant's counsel's argument, it was pointed out that up to date, the plaintiff has not taken any action to pursue his claim against anybody (except for this application) and, the caveats on the said land should not be allowed to remain forever. In reply, the plaintiff similarly accused the first defendant of not taking any steps to assert and to determine their rights (if any). To my mind, the parties will eventually come to their senses and possibly an issue of competing equities will be litigated. However, at this stage, this court should not be minded of issues not before it but will only be confined to what is at hand and to apply the correct principles thereto. It is not for this court to set directions to the plaintiff at this stage, for statute, the NLC in this case, has by itself already determined the life span of a caveat. Until the life-span of the caveat expires or the caveat is set aside, this court is not empowered to give any directions unless proper application is made thereto.

For reasons aforesaid, I order that the caveats lodged by the plaintiff do remain on the said land until their life-span expire, under s 328 of the NLC (unless extended) or, until any other application to have it set aside before its expiry. Costs of this application to the plaintiff.

Application allowed.

Reported by Yap Foo Ken
